2/2438

November 3, 2004

By Messenger

The Honorable Roger Nober
Chairman
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

RE: Section 5a Application No. 46 (Sub No. 20), Southern Motor Carriers Rate Conference, Inc.

Dear Chairman Nober:

The National Industrial Transportation League submits this letter in response to an observation made during the oral argument held in the above-referenced proceeding on October 27, 2004. During the Board's questioning of the last panel, there was a discussion suggesting that, although the statute imposes a public interest standard, it does not impose the burden of proof upon the Southern Motor Carriers Rate Conference ("SMC") to show that nationwide collective ratemaking authority is in the public interest. The League believes that such a conclusion would be directly contrary to established Board and judicial precedent on the granting of antitrust immunity.

In *Household Goods Forwarders Tariff Bureau*, Section 5a Application No. 106, 1991 MCC Lexis 83 (June 5, 1991), the ICC dismissed the application for approval of an amended collective ratemaking agreement because the applicant "failed to bear its burden of proof." *Id.* at *19. The applicable standard, former 49 U.S.C. § 10706(c), required the ICC to approve the agreement "when it finds that the making and carrying out of the agreement will further the transportation policy of section 10101...." In making that assessment, the ICC applied a three-part test that required the applicant to establish:

> (1) that its agreement enhances one or more NTP goals; (2) that the agreement does not have anticompetitive effects; and (3) that, if there are anticompetitive effects, the benefits the agreement confers on the public interest outweigh the harm.

1991 MCC Lexis at *14-15. The former 10706(c) standard is comparable to the public interest standard that SMC must meet under current 49 U.S.C. § 13703(a)(2),[1] which all parties at the oral argument seemed to define in terms of the national transportation policy at 49 U.S.C.

[1] A review of the legislative history behind § 13703, including the 1999 and 2003 amendments, reveals nothing that would suggest that Congress intended to change or affect the historical allocation of the burden of proof. Therefore, the precedent cited in this letter is fully applicable to the Board's determination of the burden of proof in this case.

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§ 13101. Therefore, the League submits that SMC has the burden to make a similar showing for approval of its application for nationwide collective ratemaking authority, which it has not done.

In *Trailer Train Co. – Pooling of Car Service with Respect to Flatcars*, 5 I.C.C. 2d 552 (1989), the ICC again noted the burden of proof that applicants seeking antitrust immunity must bear:

> In determining whether to approve antitrust immunity for the purposes of assignment and allocation [of cars], we assess whether any anticompetitive effects flowing from assignment and allocation are outweighed by the efficiencies or other public benefits flowing therefrom. In order to warrant a grant of antitrust immunity, assignment and allocation must at least be as beneficial as alternative mechanisms for achieving the same purpose. For the reasons stated below, it is our view that *Trailer Train has not sufficiently proven* that the benefits achieved through assignment and allocation could not otherwise be achieved, either by Trailer Train or third party lessors, by alternative means in a market without antitrust immunity.

Id. at 590 [emphasis added]. The ICC also noted that it has "followed a policy of strictly construing agreements that require antitrust immunity because of joint carrier activity that may lessen competition," since this approach "is consistent with the generally accepted principle that grants of antitrust immunity are to be narrowly construed." *Id.* at 560. Thus, the ICC concluded:

> [W]hen we assess a proposal that will, if approved, sanction conduct by the parties that will be free from the constraints of the antitrust laws, we closely assess the proposal and its potential service and efficiency benefits. We are inclined to approve only the narrowest proposal that is consistent both with achievement of those benefits and compliance with the statute.

Id. In its August 31, 2004 decision extending its approval of the agreement at issue in *Trailer Train* (which is now known as TTX), the Board concluded that extension of the pooling agreement approval would be warranted, in view of the immunity thereby conferred, where a proposed agreement "is as beneficial as alternative mechanisms for achieving the purpose of the pool and whether those purposes could be achieved with less restraint on competition." STB Finance Docket No. 27590 (Sub No. 3), *TTX Company, et al. -- Application for Approval of Pooling of Car Service With Respect to Flatcars* (served Aug. 31, 2004). There is no reason for

the Board to depart from these principles in determining whether SMC's proposal for nationwide collective ratemaking authority is in the public interest.

Finally, judicial precedent places the burden of proof upon the party seeking antitrust immunity. The Supreme Court has frequently held that the antitrust laws "are to be construed liberally, and that exceptions from their application are to be construed strictly." *United States v. McKesson & Robbins*, 351 U.S. 305, 316 (1956). Further, the Court has made clear that this doctrine "applies with equal force to express statutory exemptions." *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). It follows that a party seeking an exemption must bear the burden of demonstrating that an exemption is warranted.

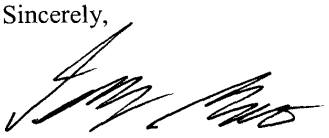
In *Latin America/Pacific Coast Steamship Conference v. Federal Maritime Commission*, 465 F. 2d 542, 545-48 (D.C. Cir. 1972), the District of Columbia Circuit surveyed the conflicting policies underlying the antitrust laws and regulatory agency statutes in an attempt to find a proper accommodation. Citing to the Interstate Commerce Act, among others, as granting explicit antitrust exemptions, the Court declared that "These exemptions must in any event be narrowly construed." *Id.* at 547.

The Court then proceeded to affirm an FMC decision that had placed the burden of proof upon the petitioners who had requested antitrust immunity. *Id.* at 551-55. The Court specifically noted that "Many scholars have also approved placing the burden of proof upon those seeking antitrust limitations," and that "once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest,' unless other evidence in the record fairly detracts from the weight of this factor." *Id.* at 554-55, *quoting FMC v. Svenska Amerika Linien*, 390 U.S. 238, 245-46 (1968). The FMC antitrust exemption statute at issue gave the FMC less discretion to *deny* antitrust immunity than 49 U.S.C. § 13703(a)(2) gives the STB to *grant* such immunity. Therefore, if the FMC properly placed the burden of proof upon the petitioners, SMC certainly must bear the same burden in this proceeding.

For the reasons stated at the hearing and in written submissions, the League submits that SMC has not met its burden of showing that expanded immunity would further the public's interest in a competitive motor carrier marketplace. There are no territorial limits on the ability of rate bureaus to offer non-immunized services to carriers (such as the compilation and distribution of CzarLite). As to immunized ratemaking activities, there are no examples of overlapping ratemaking territories enhancing competition. There is no competition among existing national rate bureaus (*e.g.* Household Goods Carriers and the National Classification Committee) and there is no evidence that carriers or competition would benefit from more than one ratemaking forum in any particular territory. Instead, broadened immunity likely will encourage the consolidation of ratemaking activities and control of collectively made benchmark class rates in

the hands of relatively few carriers, which could be highly detrimental to competition. Thus, consistent with ICC and Board precedent in favor of granting only as much immunity as is demonstrated to be needed, SMC has not met its burden of proving the need for more antitrust immunity.

Sincerely,



Jeffrey O. Moreno
Counsel for The National Industrial Transportation League

cc: The Honorable Frank P. Mulvey
The Honorable W. Douglas Buttrey
All Parties of Record